IN THE
SUPREME COURT OF MISSOURI

Appeal No. SC83939

ERNEST BLAND,

Respondent

vs.

IMCO RECYCLING, INC. and
METAL MARK, INC.

Appellants.

Appeal from the Circuit Court of Scott County Missouri
State of Missouri
Honorable David A. Dolan, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENT ERNEST BLAND

On Transfer from the Southern District
of the Missouri Court of Appeals

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JURISDICTIONAL STATEMENT

Respondent adopts the jurisdictional statement set forth in Appellants' Brief at pages 10 and 11.

SUPPLEMENTAL STATEMENT OF FACTS

Because Defendants' brief fails to set out a Statement of Facts which is fair, concise and free from argument (as required by Rule 84.04(c) of the Missouri Rules of Civil Procedure) Plaintiff provides the following additional facts which are relevant to the questions presented for determination by this Court:

A. Introduction:

Plaintiff Ernest Bland suffered third degree burns (TR. 233) over a large part of his body requiring skin grafts (TR. 233, 238-39) and resulting in permanent restrictions on the use of his shoulder as a result of severe scarring (TR. 255). He was hospitalized in the burn unit at St. John's Mercy Hospital for approximately three months (TR. 224). The burns occurred when molten aluminum was expelled from a furnace at an aluminum recycling plant in Sikeston, Missouri. (L.F. 10-12). The furnace in question had no guards, shields or doors on it (TR. 200-201).

B. Corporate Structure:

Defendants spend a good portion of their brief outlining the various relationships between their numerous separate but inter-related companies. There are two critical relationships to be analyzed for purposes of the issues raised in this appeal, the first is the relationship between Marnor Aluminum Processing, Inc. (hereinafter Marnor) which employed Ernest Bland effective May 31, 1996 (S.L.F. 099) and Metal Mark, Inc. (hereinafter Metal Mark); the second is the relationship between IMCO Recycling, Inc. (hereinafter Defendant IMCO); and IMCO Recycling of Illinois, Inc. (hereinafter IMCO of Illinois).

Some of the evidence which illustrates the complexity of the IMCO corporate structure came from Jonathan Markle who worked in different capacities for IMCO Recycling, Inc., IMCO Recycling of Illinois,

Inc., and Metal Mark. At trial he described his affiliation with each of these companies as follows:

"Q. Mr. Markle, before your employment with Alumnatech who were you associated with?

A. I worked for IMCO Recycling.

Q. There are apparently several IMCO entities which bear the name IMCO Recycling in some form, was it - -

A. Prior to moving to Cleveland, I was general manager of international development for IMCO Recycling. I worked out of the Irving, Texas office.

Q. Is that known as IMCO Recycling, Inc.?

A. I do believe that's a proper name.

Q. Prior to your - - I think you said international affairs?

A. International development.

Q. Prior to that job, where were you?

A. I worked out of Chicago Heights where I was the president of IMCO Recycling of Illinois or Metal Mark. I was the president of Metal Mark.

Q. Metal Mark was a business that you had had for a period of time?

A. Metal Mark, yes.

Q. How long were you associated with Metal Mark?

A. From 1981 until the sale to IMCO in 1995, October 2nd.

Q. After 1995 did you continue in some capacity with the business that was acquired by IMCO Recycling?

A. Yes. I stayed on as president of the Metal Mark division from that moment until my new

role as international development in Irving."

There is no question that at the time of Mr. Bland's employment Marnor was a wholly owned subsidiary of Metal Mark (TR. 181). There is a question as to the effect of an alleged merger between those two companies because the merger documents filed in the state of Illinois indicate that the companies were merging "for accounting purposes only" (S.L.F. 047, Addendum 026); because the plant continued to operate under the Marnor name (TR. 142); and because Marnor evidenced continued corporate existence by (1) entering an appearance in and defending the workers' compensation claim filed by Plaintiff (S.L.F. 078); (2) entering an appearance in and defending this civil suit without making the requisite challenge or denial of corporate existence; and (3) by joining its corporate co-defendants in a cross claim against Max Sweet.

C. <u>Employer:</u>

Marnor, the corporation allegedly subsumed in the June 3, 1996 merger with Metal Mark, Inc., affirmatively undertook to defend and provide benefits to Plaintiff in connection with a workers' compensation claim which was filed one year and 8 days after the alleged merger. (S.L.F. 076, Addendum 2). The merger documents presented to the Trial Court as evidence of the "non-existence" of Marnor state that the merger was "for accounting purposes only". (S.L.F. 047, Addendum 26). Jonathan Markle, who was the chief executive officer of Metal Mark from 1991 until 1998 (S.L.F. 008) testified that to his knowledge there was never a merger between Metal Mark and Marnor (S.L.F. 010). At the time of Ernest Bland's injury the Sikeston plant was still operating under the Marnor name (TR. 142, S.L.F. 104). Jeff Mecom, Defendant IMCO's in-house corporate counsel, testified that it was possible that the paychecks, business forms, stationary and other documents used at the Marnor facility continued to use the Marnor

name even after the alleged merger. (S.L.F. 104). Despite what his paychecks may have said, Plaintiff's employment contract was with Marnor (S.L.F. 096-098).

D. Transfer of the furnace:

At the time the furnace in question was transferred to the Sikeston plant Metal Mark was owned by Defendant IMCO (TR. 276). Jonathan Markle, former president and CEO of Metal Mark, described Metal Mark as being a "division" of Defendant IMCO at the time of the transfer (TR. 270). This was the same manner in which Metal Mark was identified in employment forms used by the Marnor plant from the time Ernest Bland was employed there at least until the time of his injury in January of 1997. (S.L.F. 100-101). These same documents show that the plant continued to operate under the Marnor name. Juan Torres, the plant manager at Marnor, testified that the plant had been bought by Defendant IMCO (L.F. 00073). Jeff Mecom testified that Defendant IMCO owned all of the stock of Metal Mark. (TR. 381).

E. Plaintiff's accident involving the furnace:

While the previous omissions from the Defendants' Statement of Facts may have been mere oversights, Defendants' continued omission of the most material fact in this case is inexcusable.

Juan Torres, the person who managed the Marnor plant (TR. 144), the person who was physically present in Sikeston, Missouri (TR. 144), the person who supervised the assembly of the furnace in question (S.L.F. 068) and the person who ordered that the doors be removed from the previous furnaces operating at the Marnor plant (TR. 107-108) **was by his own testimony an employee of IMCO Recycling, Inc., "out of Texas" (TR. 151-152).** There was no contrary evidence submitted by the Defendants to rebut this pivotal fact.

POINTS RELIED - ARGUMENT I

I. Plaintiff made a submissible case against Defendant IMCO because Plaintiff proved that Defendant IMCO supplied a dangerous instrumentality in that Defendant IMCO's role in transferring and assembling the furnace was established by credible evidence and because there was ample evidence that Defendant IMCO knew or, by the exercise of ordinary care could have known, that the furnace which injured Ernest Bland contained no guards, shields or doors in that Defendant IMCO's employee Juan Torres managed the plant and supervised the installation of the furnace when it arrived in Missouri.

Givens v. Spalding Cloak Company, 63 S.W.2d 819 (Mo. App. 1933)

Kennedy v. Fournie, 898 S.W.2d 672 (Mo. App. E.D. 1995)

Simpson v. Johnson's Amoco Food Shop, Inc., 36 S.W.3d 775 (Mo. App. E.D. 2001)

Mercantile Bank and Trust Co. v. Vilkins, 712 S.W.2d 1 (Mo. App. W.D. 1986)

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Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. App. S.D. 2000)

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Robin Farms, Inc. v. Barholome, 989 S.W.2d 238 (Mo. App. W.D. 1999)

Rob-Lee Corporation v. Cushman, 727 S.W.2d 455 (Mo. App. 1987)

United States v. Page, 350 F.2d 28 (10th Cir. 1965).

Wright v. Over the Road and City Transfer Drivers, et al, 945 S.W.2d 481

(Mo. App. W.D. 1997)

Restatement 2d of Torts, Section 392.

Black's Law Dictionary 5th Edition, page 303

Webster's New World Dictionary and Thesaurus, page 133

POINTS RELIED ON - ARGUMENT II

II. The Trial Court did not err in denying IMCO Recycling, Inc.'s Motion to Dismiss for lack of personal jurisdiction because the Trial Court had personal jurisdiction over IMCO Recycling, Inc., in that (a) IMCO Recycling, Inc. waived its right to contest personal jurisdiction by filing a cross claim against co-defendant Max Sweet; (2) IMCO Recycling, Inc. committed one or more of the predicate acts enumerated in Missouri Long-Arm Statute necessary to subject IMCO Recycling, Inc. to personal jurisdiction in Missouri; and (c) IMCO Recycling, Inc. had sufficient minimum contacts with Missouri to satisfy the due process requirements of the 14th Amendment to the United States Constitution.

State ex rel. Taylor v. Luten, 710 S.W.2d 906 (Mo. App. E.D. 1986)

State ex rel. Sperandio v. Clymer, 581 S.W.2d 377, 384 (Mo. banc. 1979)

State ex rel. Metal Service Center of Georgia, Inc. v. Gaertner, 677 S.W.2d 325 (Mo. banc. 1984)

Shirkey v. McMaster, 876 S.W.2d 648, 650 (Mo. App. W.D. 1990)

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Chromalloy American Corp. v. Elyria Foundry, Co. 955 S.W.2d 1,4 (Mo. banc 1997)

Germanese v. Champlin, 540 S.W.2d 109, 112 (Mo. App. E.D. 1976)

Hagen v. Rapid American Corp., 791 S.W.2d 452 (Mo. App. E.D. 1990)

Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (Mo. App. E.D., Nov. 20, 2000)

Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d 727, 731-32 (Mo. banc. 1982)

State ex rel K-Mart Corp. v. Holliger, 986 S.W.2d 165, 168 (Mo. banc 1999)

Stavrides v. Zerjar, 848 S.W.2d. 523 (Mo. App. E.D. 1993)

TSE Supply Co. v. Cumberland Natural Gas Co., 648 S.W.2d 169 (Mo. App. E.D. 1983)

Rule 54.06, Missouri Rules of Civil Procedure

Section 506.500, RSMo.

POINTS RELIED ON - ARGUMENT III

III. The Trial Court did not err in denying Metal Mark, Inc.'s Motion to Dismiss for lack of subject matter jurisdiction because (1) the Trial Court had jurisdiction to make a finding as to whether Ernest Bland was an employee of Metal Mark on the date of the accident; (2) the Trial Court specifically found that Ernest Bland was not an employee of Metal Mark but was, instead, employed on that date by Marnor Aluminum Processing, Inc.; and (3) the Trial Court did not abuse its discretion in making these findings because there was compelling evidence that Marnor and not Metal Mark was the Plaintiff's employer at the time of the injury in that Metal Mark's claim was based solely on the premise that Metal Mark, had become Bland's employer at the time of the merger by operation of law. This premise was negated by the responsive pleadings filed on behalf of the defendants which constitute an admission of Marnor's continued corporate existence.

Rule 55.13, Missouri Rules of Civil Procedure

Student Loan Marketing Association v. Holloway, 25 S.W.3d699, 704 (Mo. App. W.D. 2000)

Schneider v. Best Truck Lines, 472 S.W.2d 655 657-58 (Mo. App. 1971)

Porter v. Erickson Transport Corp., 851 S.W.2d 725 (Mo. App. S.D. 1993)

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Jones v. Jay Truck Driver Training Center, Inc., 709 S.W.2d 114, 115-116 (Mo banc. 1986) *affirming*

Lamar v. Ford Motor Company, 409 S.W.2d 100 (Mo. 1966)

Schepp v. Mid City Trucking Company, 291 S.W.2d 633, 643 (Mo. App. E.D. 1956)

Grgic v. P&G Construction, 904 S.W.2d 464, 467 (Mo. App. E.D. 1995)

Hall v. Denver-Chicago International, Inc., 481 S.W.2d 622, 628 (Mo. App. W.D. 1972)

James v. Union Electric Company, 978 S.W.2d 372, 374 (Mo. App. E.D. 1998)

Quick v. All Tel Missouri, Inc., 694 S.W.2d 757 (Mo. App. E.D. 1985)

Section 287.120 RSMo., 1994

Section 351.458, RSMo. 1994

Shaver v. First Union Realty Management, Inc. 713 S.W.2d 297, 299 (Mo. App. S.D. 1986)

Soars v. Soars - Lovelace, Inc., 142 S.W.2d 866 (Mo. 1940)

Wade v. Wade, 982 S.W.2d 330 (Mo. App. S.D. 1999)

805 ILCS 5/11.40

Black's Law Dictionary 5th Ed. page 982

ARGUMENT I

I. Plaintiff made a submissible case against Defendant IMCO because Plaintiff proved that Defendant IMCO supplied a dangerous instrumentality in that Defendant IMCO's role in transferring and assembling the furnace was established by credible evidence and because there was ample evidence that Defendant IMCO knew or, by the exercise of ordinary care could have known, that the furnace which injured Ernest Bland contained no guards, shields or doors in that Defendant IMCO's employee Juan Torres managed the plant and supervised the installation of the furnace when it arrived in Missouri.

A. Standard of Review:

It is well settled that the existence of a duty owed by an alleged tortfeasor necessary to establish a submissible case of negligence is a question of law to be determined by the Trial Court viewing the evidence in a light most favorable to the Plaintiff. Love v. Hardee's Food Systems, Inc., 16 S.W.3d 739, 742 (Mo. App. E.D. 2000). In its review this Court must presume Plaintiff's evidence is true and disregard any of Defendant's evidence which does not support Plaintiff's case. *Id.* A reviewing Court shall not overturn a jury verdict unless there is a complete absence of probative facts to support it. *Id.* (emphasis ours).

B. Plaintiff's cause of action against Defendant IMCO:

Plaintiff's claim is brought under Section 392 of the Restatement 2d of Torts, Chattel Supplied When Dangerous For Intended Use. That section states as follows:

"One who supplies to another, directly, or through a third person, a chattel to be used for

the supplier's business purposes is subject to liability for those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use the chattel is supplied.

a. If the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or

b. If he fails to exercise reasonable care to discover its dangerous condition or character and to inform those whom he should expect to use it." (emphasis ours).

Missouri courts have recognized that the class of defendants subject to liability under Section 392 is larger than the class of defendants subject to strict liability. Ridenhour v. Colson Caster Corp., 687 S.W.2d 938, 946 (Mo. App. S.D. 1985).

In the instant case the evidence was that all of the Defendants had a business interest in transferring the furnace from Pittsburgh to Marnor. The Pittsburgh operation was closing down and needed to divest itself of its assets. (TR. 272, 275). Metal Mark, the parent corporation of both Pittsburgh and Marnor, benefitted from the transfer of the furnace from one of its subsidiaries which was closing down to another of its subsidiaries which would use the furnace to increase profits. (TR 277, 279). Defendant Marnor benefitted from the transfer of the furnace in that its plant was able to use the furnace to increase profitability and efficiency (TR. 277) and Defendant IMCO, described as the "ultimate parent"[1] all of these other

[1] *See*, Deposition of IMCO Recycling, Inc.'s chief financial officer, Paul DuFour, (S.L.F.

corporations, directly benefitted from the profits generated by virtue of the transfer of the furnace. (TR. 279-80). Defendant IMCO was the company which decided to close the Pittsburgh plant (TR. 272) because its operation was duplicative of Defendant IMCO's nearby Sapulpa, Oklahoma plant (TR. 183, 272). Further, Defendant IMCO had the say so as to where the furnace would ultimately be transferred. Metal Mark's president, Jonathan Markle, testified that he made the decision to transfer the furnace "in co-ordination with Dallas". If Markle had had the authority to authorize the transfer without Defendant IMCO's approval or authority, he would not have had any reason to involve Defendant IMCO in the decision making process before ordering the transfer. Finally, a critical point which has never been addressed by the Defendants is that the installation of the furnace was performed under the direction and control of Defendant IMCO's employee Juan Torres. (S.L.F. 068).

3. Defendants had the burden of proof on the issue of corporate identity:

While the burden of proof is generally on the party who asserts the affirmative of an issue that general rule no longer applies where the facts are peculiarly within the knowledge of the opposing party. Kennedy v. Fournie, 898 S.W.2d 672 (Mo. App. E.D. 1995). At the very least Plaintiff Ernest Bland is entitled to a presumption that IMCO Recycling, Inc. supplied the furnace.

1. Burden of Proof

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114).

When a defendant fails to bring forth witnesses or other evidence to establish a contested fact which is peculiarly within its knowledge or control a presumption arises that such testimony or evidence would be unfavorable to Defendant's position Simpson v. Johnson's Amoco Food Shop, Inc., 36 S.W.3d 775 (Mo. App. E.D. 2001). The defendants in the instant case chose not to present testimony from anyone affiliated with IMCO Recycling Inc.'s wholly owned subsidiary, IMCO Recycling of Illinois, Inc. that the decision to transfer the furnace was made by Markle in coordination with IMCO Recycling of Illinois, Inc. or some other IMCO entity. The Defendants did bring forth as a witness Jeff Mecom who was an officer of IMCO Recycling, Inc. Mr. Mecom also serves as in-house counsel for IMCO Recycling, Inc. handling various legal matters concerning its subsidiaries. (TR. 380). Interestingly, Mr. Mecom never denied that IMCO Recycling, Inc. was the company with whom Mr. Markle coordinated the decision to transfer the furnace. He testified that he didn't know "from a management standpoint" as to how the furnace was transferred. (TR. 382). In light of his various positions with IMCO Recycling, Inc. this testimony was implausible and the jury was free to disbelieve it. Benoit v. Missouri Highway and Transportation Commission, 33 S.W.3d 663 (Mo. App. S.D. 2000). Someone at IMCO Recycling, Inc. participated in the decision to transfer the furnace.[2] It is not unreasonable to expect that the Defendants would bring that person forward if, in fact, he or she was not affiliated with IMCO Recycling, Inc. In the face of IMCO Recycling, Inc.'s failure to bring forward such a witness the jury was justified in making the inference that it was IMCO Recycling, Inc. which made the decision to transfer the furnace in coordination with Mr. Markle.

2. Presumption

It is undisputed that Jonathan Markle decided to have the furnace sent to Sikeston "in coordination with Dallas". Defendant admits that this "presumably" meant that Markle conferred with someone at IMCO Recycling, Inc. Under Missouri law, once a presumption arises the burden of going forward with the evidence shifts to the Defendant. Mercantile Bank and Trust Co. v. Vilkins, 712 S.W.2d 1 (Mo. App. W.D. 1986). The Defendants in this case have wholly failed to meet that burden.

D. It would be inequitable to allow Defendant IMCO to avoid liability based

[2] According to Jonathan Markle's testimony. Defendants produced no witness who disputed Markle's testimony on this point.

on an alleged failure to sufficiently prove identity:

Defendants argue that Plaintiff's evidence that IMCO Recycling, Inc. supplied the rotary furnace which caused injury to Ernest Bland is insufficient to make out a prima facie case because the various inferences raised could apply with equal certainty to both IMCO Recycling, Inc. and IMCO Recycling of Illinois, Inc. This claim is not supported by the evidence and therefore must fail.

First of all, it would be inequitable to allow the Defendants to avoid liability based on this argument. Where a party fails to produce evidence readily available to that party and not equally available to the opposing party, the trier of fact may infer that the evidence would have been unfavorable to the party having the means of producing it.[3] Simpson v. Johnson's Amoco Food Shop, Inc., *supra*.. In the instant case, the identity and business affiliation of the person who coordinated the decision to transfer the furnace with Jonathan Markle was vital information of which Defendants clearly had a superior means of knowledge. The case against IMCO Recycling, Inc. could have been defeated by clear evidence that the person which whom Jonathan Markle coordinated the transfer was not an employee or officer of IMCO Recycling, Inc.

The attempt to avoid liability by the type of conduct in which the IMCO family of business entities has engaged in this case has long been met with disapproval by the courts of this state. In Givens v. Spalding Cloak Company, 63 S.W.2d 819 (Mo. App. 1933) Defendant Spalding Cloak Company attempted to evade liability by arguing that the jury's finding in favor of one of its co-defendants (a Mrs.

[3] Although Plaintiff's counsel would have been entitled to argue this negative inference to the jury, counsel chose not to do so. Nevertheless, this court may make the unfavorable inference for itself.

Brisboise) should also serve to exonerate it because the exonerated Defendant was the employee of Defendant Spalding against whom the jury rendered a verdict.

In rejecting the Defendant's argument the Court said:

> "It would have been an easy matter for the Spalding Cloak Company, and also Mrs. Brisboise for that matter, to have made a full, frank, and complete disclosure of the exact relations existing between them so as to show that the cloak company could not be held upon any theory or doctrine of respondeat superior, if such was the fact. But neither by pleading nor evidence did they see fit to do this, and their silence on the matter which was exclusively within their knowledge may be regarded as a strong circumstance against them. (internal citations omitted).
>
> . . . The appealing defendant could have clearly shown what the true facts were. . . . Plaintiff ought not to be confined to the precise case defendant insists she pleaded in attempting to set out the unknown relationship existing between the two defendants with reference to the store and beauty shop. That was a relationship strictly within the knowledge of the defendants, but they chose to be as secret about it as they possibly could, and furnished no pleading or evidence in that regard except that which was "cork-screwed" out of them by cross examination. Hence, they cannot now complain if the evidence adduced discloses the situation from which the jury could draw a conclusion at variance with the defendant's undisclosed notion thereof." (Givens at 826-27)

This rationale applies with equal force to Defendants' claim in this appeal that Mr. Markle's

testimony was insufficient to establish the identity of Defendant IMCO Recycling, Inc. as the company with whom he coordinated the decision to transfer the furnace to Missouri. A fair evaluation of Mr. Markle's testimony requires that it be viewed in context It is when viewed in context that it becomes apparent that the location (Dallas) was used generally to identify IMCO Recycling, Inc. That testimony (which was presented to the jury via videotape) was as follows:

"Q: How did the decision come to be made to transfer the furnace that was in Pittsburgh Aluminum to Mamor in Sikeston?

A: At the time of the closure of Pittsburgh we decided to move the plant - - move the furnace to Sikeston to hold it there.

Q: When you say we decided, who is the "we" that you are referring to?

A: The "we" was myself in coordination with Dallas.

Q: You were then the manager of Metal Mark, Inc. which was wholly owned subsidiary of IMCO Recycling, Inc. in Dallas?

A: That's correct.

Q: And I take it you are accountable and responsible to IMCO Recycling, Inc. in Dallas for the performance of Metal Mark, Inc.?

A: That's correct.

Q: When you make major capital decisions, did you typically talk to them about yes or no?

A: Yes." (emphasis ours) (TR 275-76)

First, Plaintiff would note that this line of questioning was undertaken not by Plaintiff's counsel, but by Mr. Sidwell, attorney for all of the corporate Defendants, including IMCO Recycling, Inc. If the

connection between the two companies is unclear or imprecise it is as a result of the defense counsel's failure to make a clear record rather than anything that the Plaintiff did or did not do.

Defendant IMCO should not be exonerated as a reward for this type of subterfuge The judgment entered on the jury's verdict should be affirmed.

E. Plaintiffs presented sufficient evidence that IMCO Recycling, Inc. supplied the rotary furnace:

Even if the aforementioned arguments are not considered by this Court, there are sufficient facts to support a reasonable inference that Defendant IMCO supplied the defective furnace.

Proof of essential facts may be accomplished by circumstantial evidence so long as the desired inference is established with such certainty as to cause it to be the **more probable** of the conclusions to be drawn. Wright v. Over the Road and City Transfer Drivers, et al, 945 S.W.2d 481 (Mo. App. W.D. 1997). (emphasis ours)

Defendant argues that Plaintiff has violated the rule prohibiting the "piling of inferences" ignoring the fact that a party may draw any number of inferences so long as each has a factual foundation. Rob-Lee Corporation v. Cushman, 727 S.W.2d 455 (Mo. App. 1987). As will be demonstrated, *infra*, the inferences upon which Plaintiff relied to make a submissible case are adequately supported by facts from which said inferences may reasonably be drawn.

1. Facts supporting a finding that Markle's references to "IMCO" are references to IMCO Recycling, Inc.

Facts:

IMCO Recycling, Inc. is a corporation in Texas which owns some of its own plants and facilities

(TR. 405) including one in Sapulpa, Oklahoma (TR. 409). These facts were established by the admission of the Defendants' attorney in his closing argument and Plaintiff is thereby relieved from the burden of proving them. (MAI. 2.01).

Jonathan Markle testified that after Defendant IMCO bought Metal Mark the decision was made to close the Pittsburgh, Kansas plant due to the existence of "another IMCO plant in nearby Sapulpa, Oklahoma." (TR. 272). We know that this second IMCO reference is to IMCO Recycling, Inc. due to the previously noted admission in the closing argument of Defendants' counsel that the plant in Sapulpa, Oklahoma was owned by IMCO Recycling, Inc. Further, Jeff Mecom, IMCO Recycling, Inc.'s in house attorney testified that IMCO Recycling, Inc. owned all of the stock of Metal Mark, Inc. (TR. 381) which further substantiates that the IMCO which "bought Metal Mark" was IMCO Recycling, Inc. Additionally, Markle testified that the Pittsburgh plant no longer served a purpose in the IMCO organization and that it was his belief that the decision to close the plant was made by IMCO's management. (TR. 272).

Logical Inference:

Although Markle's references to the "IMCO organization" and "IMCO's management" did not specifically identify IMCO as IMCO Recycling, Inc. that would be a reasonable inference from the admitted fact that IMCO Recycling, Inc. was the entity which owned the plant whose services would have been duplicated by the Pittsburgh facility which was being dismantled.

Facts:

Paul DuFour, the executive vice president and CEO for IMCO Recycling, Inc. (TR. 180) testified that the IMCO Recycling, "which owned the Sapulpa plant" was the IMCO which made the decision to close down the Pittsburgh plant. (TR. 183). Further, the officers of Metal Mark, Inc., which had owned

the Pittsburgh facility prior to the IMCO purchase (TR.279), had nothing to say about whether the plant stayed opened or was closed down. (TR. 184).

Logical Inference:

The foregoing facts make a strong case that IMCO Recycling, Inc. was calling the shots insofar as dismantling the Pittsburgh operation which was actually owned by Metal Mark. This testimony suggests that it would have been highly unlikely that Jonathan Markle, as an officer of Metal Mark, would have had any authority, absent consent or approval from IMCO Recycling, Inc., to transfer or dispose of any of the Pittsburgh assets including the furnace at issue in this case.

Facts:

IMCO Recycling, Inc. owned the Sapulpa, Oklahoma plant (TR. 409). After the Pittsburgh, Kansas facility previously owned by Metal Mark was acquired, it was shut down upon orders from IMCO Recycling, Inc. because the operations at Pittsburgh were duplicative of the Sapulpa, Oklahoma operation. (TR. 183, 272). The decision to close the Pittsburgh operation led to the dismantling of the plant and the eventual transfer of the furnace to the Marnor facility in Sikeston, Missouri. (TR. 272). Jonathan Markle made the decision to transfer the furnace to Sikeston, in coordination with Dallas[4] (TR. 276). Markle was

[4] In his dissenting opinion, Phillip Garrison, judge for the Southern District of the Missouri Court of Appeals contends that we do not know what Markle meant by "in coordination with Dallas." Plaintiff respectfully disagrees. Given its plain meaning "coordinate" means "equal, of the same order, rank, degree or importance" Black's Law Dictionary, 5th Edition., page 303. "Coordination" is defined as harmonious action whereby persons or things of the same order or importance bring

accountable and responsible to IMCO Recycling, Inc. in Dallas for the performance of Metal Mark (TR. 276). This testimony was an unequivocal reference to IMCO Recycling, Inc. the named defendant and not to any other IMCO entity. Markle testified that it was his practice to consult with IMCO Recycling, Inc. when making major capital decisions such as whether or not to transfer a furnace. (TR. 276). At the time the furnace in question was transferred Marnor was a wholly owned subsidiary of Metal Mark (Defendants' Exhibit "B") the stock of which had been purchased by IMCO Recycling, Inc. (TR. 381). Moving the furnace would increase the production and efficiency of the Marnor plant (TR. 276-77) which would increase the profits to both Metal Mark and IMCO Recycling, Inc. (TR. 280). All of these various entities filed consolidated tax returns (TR. 382-83). The profits of the company ultimately ended up in the pockets of IMCO Recycling, Inc., the "ultimate parent". (TR. 383, S.L.F. 000114).

Further, there was no testimony that IMCO Recycling of Illinois, Inc. had any connection to the Sapulpa, Oklahoma plant or any involvement with the decision to close down Pittsburgh and transfer the

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something to proper order. Webster's New World Dictionary and Thesaurus, page 133. Thus, given its plain meaning, Markle's testimony that transfer of the furnace was made "in coordination with Dallas" creates a reasonable inference that "Dallas" had a role at least equal to that of Mr. Markle and Metal Mark in causing the furnace to be transferred to the state of Missouri.

furnace to Marnor in Sikeston. Nor was there any testimony that IMCO Recycling of Illinois, Inc. was headquartered in Dallas. The evidence which the jurors did hear about IMCO Recycling of Illinois from Defendants' attorney was that it was a Delaware Corporation.(TR. 89). The only other evidence regarding its location came from Jonathan Markle who testified as follows:

"Q. Mr. Markle, before your employment with Alumnatech who were you associated with?

A. I worked for IMCO Recycling.

Q. There are apparently several IMCO entities which bear the name IMCO Recycling in some form, was it - -

A. Prior to moving to Cleveland, I was general manager of international development for IMCO Recycling. I worked out of the Irving, Texas office.

Q. Is that known as IMCO Recycling, Inc.?

A. I do believe that's a proper name.

Q. Prior to your - - I think you said international affairs?

A. International development.

Q. Prior to that job, where were you?

A. I worked out of Chicago Heights where I was the president of IMCO Recycling of Illinois or Metal Mark. I was the president of Metal Mark."

Logical Inference:

The reasonable inference from the foregoing evidence is that Jonathan Markle coordinated the transfer of the furnace with IMCO Recycling, Inc., as opposed to any of the other IMCO entities.

All of the logical inferences set forth herein are based on facts which are sufficient to make out a

prima facie case for the Plaintiff on the issue of who supplied the defective furnace.

As previously stated, the class of defendants subject to liability under Section 392 is larger than the class of defendants subject to strict liability. Ridenhour, *supra*. However, even under a traditional strict liability (Restatement 2d of Torts, Section 402A) analysis the actions of Markle taken in coordination with IMCO are more than sufficient to make a case of liability against IMCO. For, "Under the stream of commerce approach to strict liability no precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member not closely connected with the customer is required before the courts will impose strict liability; it is the defendant's participatory connection, for his personal profit or other benefit . . . . which calls for the imposition of strict liability," Menschik v. Mid-America Pipeline Co., 812 S.W.2d 861, 863-64 (Mo. App. 1991) quoting Gunderson v. Sani-Kem Corp., 674 S.W.2d 665 (Mo. App. 1984) and 72 C.J.S. Products Liability, Section 40 (Supp.) (emphasis ours).

Certainly, IMCO Recycling, Inc. did not refuse the profits ending up in its pockets which were attributable to the transfer of this furnace. Plain fairness dictates that it be accountable for the injuries attributable to this furnace as well.

2. Facts supporting a finding that Juan Torres' references to "IMCO" were to IMCO Recycling, Inc.

The identity of Juan Torres' employer is also a fact of critical significance which was within the peculiar knowledge of the Defendants. As a result, Defendants also bear the burden of proof on the issue of the identity of his employer. *See*, Kennedy v. Fournie, *supra*.

Jeff Mecom, Defendant IMCO's corporate counsel, was also the keeper of all of the corporate record books for IMCO Recycling, Inc. and its subsidiaries (TR. 376-77). He was an employee of

IMCO Management Partnership (TR. 376) the company which managed the payroll and other employee benefit programs for Metal Mark and Marnor. (Defendants' Ex. K). If anyone could have cleared up the issue of which entity actually employed Juan Torres it was Mr. Mecom. He did not do so thus a presumption arises that Juan Torres worked for IMCO Recycling, Inc. as per his testimony. The presumption, unrebutted, established a prima facie case that Juan Torres, the plant manager at the Marnor facility in Sikeston, Missouri was an employee of IMCO Recycling, Inc.

The proof that Torres was IMCO Recycling, Inc.'s employee serves three purposes:

(1) It is establishes a physical presence for IMCO Recycling, Inc. in the state of Missouri which defeats the Defendants' arguments that IMCO Recycling, Inc. did not do business in Missouri and did not have sufficient minimum contacts to establish a basis for personal jurisdiction;

(2) It establishes that IMCO Recycling, Inc., through its employee/agent Juan Torres, supplied the furnace by taking the dismantled furnace and assembling it for operation at Marnor (TR. 068);

(3) It establishes that IMCO Recycling, Inc. knew or could have known that the furnace was in a dangerous condition without guards, screens or shields because it was assembled by its own employee whose knowledge may be imputed to IMCO Recycling, Inc. Robin Farms, Inc. v. Bartholome, 989 S.W.2d 238 (Mo. App. W.D. 1999).

Neither Judge Garrison's dissent in the Southern District nor the Defendants' Brief address the important ramifications of Juan Torres' testimony that during the time he was the plant manager of the Marnor facility his paychecks came "out of Texas" and to the best of his knowledge were issued by IMCO

(L.F. 00072).

Once again, even absent a presumption that Defendant IMCO was Torres' employer, Plaintiff proved sufficient facts to support a reasonable inference that it was IMCO Recycling, Inc., and not any other IMCO entity that employed him.

Facts:

Juan Torres was the plant manager at Marnor where Ernest Bland was injured (TR. 144). Torres testified that he came to the Marnor plant in July of 1996 shortly after it had been purchased by IMCO. (L.F. 00073). As previously noted, the "IMCO" which purchased Metal Mark, Inc. (Marnor's parent company) was IMCO Recycling, Inc. (TR. 381). Torres testified that when he arrived at the Marnor facility the furnace in question was not operational. Although the furnace was at the plant it had not been assembled. He supervised the assembly of the furnace (S.L.F. 00068). Although Torres' immediate supervisor, Larry Lipa, was a Metal Mark employee, (L.F. 00072), Torres also testified that Steve Whitehead, Regional Manager for Defendant IMCO had the authority to fire him (L.F. 00073). Once again, there was little or no evidence that IMCO Recycling of Illinois, Inc. was located or had any presence in Texas. In fact, while Defendant's counsel specifically discussed the physical location of each of IMCO Recycling, Inc.'s other subsidiaries, the only thing that he said about IMCO Recycling of Illinois, Inc. was that it was a Delaware Corporation.(TR. 88-89). Jonathan Markle, one time president of IMCO Recycling of Illinois said that he worked out of Chicago Heights, Illinois when he held that position. (TR. 270). On the other hand there were numerous references to the fact that IMCO Recycling, Inc. was located in Dallas or Irving, Texas, including Markle's testimony that when he left IMCO Recycling of Illinois to begin working for IMCO Recycling, Inc. he moved from Illinois to Irving, Texas. (TR. 270).

Logical Inference:

IMCO Recycling of Illinois, could not logically have been the company to which Torres was referring when he talked about the identity of his employer. His various references to "IMCO", cited above, were made during a continuing line of questioning which began with a reference to the "IMCO", which had purchased the Marnor plant, said entity having previously been identified by Jeff Mecom, as being IMCO Recycling, Inc. (TR. 381). As Defendant IMCO's employee, the personal actions of Juan Torres in making the furnace operational are certainly evidence of Defendant IMCO's role in "supplying" the furnace. As noted by Defendants in their brief at page 49, application of Section 392 of the Restatement is "limited to circumstances where the chattel is 'supplied' by the person sought to be held liable, and was at one time in its control and possession. The typical situation would be where such a person made or assembled them, then furnished or 'supplied' them to another." *citing*, United States v. Page 350 F.2d 28 (10th Cir. 1965). (emphasis ours). The assembly of the furnace under the supervision of Defendant IMCO's employee Juan Torres is exactly the typical situation to which Section 392 was intended to apply.

Comment (c) to Section 392 makes it clear that ownership of the chattel is immaterial. In order for this section to apply the supplier may lease or even borrow the equipment. The question is whether he had possession or control of it for the purposes of using it in connection with his business. Under the foregoing definitions and evidence Defendant IMCO, by virtue of its role in assembling the furnace, clearly controlled the furnace which caused the injury to the Plaintiff.

The foregoing demonstrates that the Plaintiff did not engage in a prohibited "piling of inferences" in order to make a submissible case. The established facts and reasonable inferences make a prima facie

case on behalf of the Plaintiff which then shifted the burden of going forward with the evidence to the Defendants. If in fact IMCO Recycling, Inc. did not supply the furnace, it was the Defendants who had the burden of adducing evidence to support their contention that some other IMCO entity supplied the furnace and/or employed Juan Torres. As previously noted, this evidence was available only to the Defendants who chose to hide behind a veil of secrecy rather than to present it in an effort to rebut Plaintiff's case. As a result, the Defendants cannot now be heard to complain about the conclusions drawn by the jury based upon the evidence adduced by the Plaintiff. In addition, the rule against "piling inferences" is not a general rule applicable to all situations but is rule of reason governing only when the proven facts and the reasonable implications furnish no basis for agreement or disagreement by persons of average intelligence as to whether the factum probandum (the fact which is in issue) has been established. Rob-Lee, supra at 459.

Both the Trial Court and the majority of the judges on the Southern District Court of Appeals (who certainly constitute persons of average intelligence) have found that reasonable persons could disagree about the evidence and that the evidence adduced by the Plaintiff was sufficient to make a submissible case. This Court has many times pronounced that it is not in the business of second guessing factual determinations of the lower courts. Nor should it do so in this case.

F. Plaintiff presented sufficient evidence that IMCO knew or in the exercise of ordinary care could have known that the furnace contained no guards, shields or doors or that the furnace was delivered to the Marnor plant without doors:

Defendant inaccurately argues that the only evidence Plaintiff presented on the issue of Defendant IMCO's knowledge was Mr. Markle's testimony. Again, Defendant ignores the crucial fact that the

manager of the Marnor plant, Defendant IMCO's own employee Juan Torres[5] was the person who supervised the assembly and installation of the furnace at the Marnor plant. (S.L.F. 00068).

[5] The facts supporting the inference that Juan Torres was employed by IMCO Recycling, Inc. are set forth in Section I (E), subparagraph (2), *supra* at pages 30-33.

The evidence regarding Defendants' knowledge in this case is clear. Although the Marnor plant at one time had furnaces with doors, the furnace in question was designed without doors. Juan Torres supervised the installation of the furnace in the Sikeston plant obviously knew it had no doors, screens or guards. (TR. 107). He was physically present at the plant and was well acquainted with the condition of the furnace. He also knew the danger which the furnace posed. There was evidence that more than one employee (including the previous plant manager) had suffered burns as a result of the phenomenon known as "blow-out". (TR. 115-116). The evidence at trial showed that "blow-out" was a known hazard of the industry.[6] In addition, Juan Torres testified that Kevlar safety aprons were issued to protect against "blow-out" (TR. 147) and that the plant showed safety films regarding the potential dangers of furnace explosions such as the one which occurred in this case. (TR. 146).

Not only did Defendant IMCO have information as to injuries which had occurred in the Sikeston plant, but it also had the benefit of the experience of a huge explosion at one of its other plants where severe

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[6] See, e.g. Plaintiff's trial Exhibit "10", guidelines for handling molten aluminum, a publication of the Aluminum Association issued in December of 1990. Among other things, Exhibit "10" states that proper design of equipment and facilities, as well as the observance of exact standards of housekeeping, can significantly minimize the chance of fire and explosions due to splash or leaks of molten aluminum. It further notes that there are statistics which show that the majority of severe explosions involving molten aluminum occur during melting and that one of the primary causes of explosions is foreign materials, including moisture contaminating the charge. It notes that vapor explosions can range from small "pops" to catastrophic events where the force of the blast wave can destroy equipment and facilities.

damage was done to the building (TR. 335-36) but in which not one employee was injured because the furnace in question in that incident had doors. (TR. 340). From all of this evidence the jury could have justifiably concluded that Defendant IMCO knew, or in the exercise of ordinary care could have known, of the dangerous condition of the furnace which injured Ernest Bland and Defendants' arguments on this point have no merit. Plaintiff made a submissible case. The jury's verdict should be affirmed.

G. Conclusion:

Plaintiff's evidence is sufficient to make out a prima facie case against IMCO Recycling, Inc. The jury's finding of liability against IMCO Recycling, Inc. was based on inferences properly arising from the evidence adduced that IMCO Recycling, Inc. was the entity in Dallas with whom Jonathan Markle coordinated the transfer of the furnace and the entity in Dallas which employed Juan Torres the plant manager at the Marnor facility at the time of Ernest Bland's injury. Defendants failed to meet their burden of proof on a pivotal issue which was solely within their knowledge. At a minimum (even if this Court finds the burden of proof was not the Defendants) Plaintiff is entitled to a presumption that IMCO Recycling, Inc. supplied the furnace. Once the Plaintiff had made a prima facie case the burden of going forward with the evidence shifted to the Defendants who made no effort whatsoever to establish that Jonathan Markle coordinated the transfer of the furnace with IMCO Recycling of Illinois, Inc. and not IMCO Recycling, Inc. Nor was any effort made by the Defendants to establish that Juan Torres was not employed by IMCO Recycling, Inc. There is no basis upon which this Court can justifiably disturb the jury's verdict. The trial court's ruling as to submissibility of the case should be affirmed.

ARGUMENT II

II. The Trial Court did not err in denying IMCO Recycling, Inc.'s Motion to Dismiss for lack of personal jurisdiction because the Trial Court had personal jurisdiction over IMCO Recycling, Inc., in that (a) IMCO Recycling, Inc. waived its right to contest personal jurisdiction by filing a cross claim against co-defendant Max Sweet; (2) IMCO Recycling, Inc. committed one or more of the predicate acts enumerated in Missouri Long-Arm Statute necessary to subject IMCO Recycling, Inc. to personal jurisdiction in Missouri; and (c) IMCO Recycling, Inc. had sufficient minimum contacts with Missouri to satisfy the due process requirements of the 14th Amendment to the United States Constitution.

A. Introduction and Standard of Review:

IMCO Recycling, Inc. is a Delaware corporation with its principal place of business in the state of Texas. (L.F. 139). It operated an aluminum recycling plant in Sikeston, Missouri and maintained a physical presence in this state by virtue of its employee, plant manager Juan Torres. (TR. 144). Defendant IMCO contends that the Trial Court lacked personal jurisdiction over it because it did not satisfy the Missouri long-arm statute and because it did not have sufficient minimum contacts with the state of Missouri to satisfy due process requirements. A fair and complete statement of facts does not support the Defendants' contention.

The Trial Court had jurisdiction to determine the extent of its jurisdiction over defendants in the original cause of action. TSE Supply Co. v. Cumberland Natural Gas Co., 648 S.W.2d 169 (Mo. App. 1983). The Trial Court, having heard evidence on the claim of lack of personal jurisdiction, specifically made a finding that it did have personal jurisdiction over Defendant IMCO. (TR. 371). The Trial Court was

free to believe or disbelieve any statements tendered in support of this jurisdictional question. It has been held that it is within the sole discretion of the trial court to make such factual determinations. Shirkey v. McMaster, 876 S.W.2d 648, 650 (Mo. App. W.D. 1990).

In reviewing the Trial Court's ruling on a motion for judgment notwithstanding the verdict (or, in the alternative for a new trial) the evidence and all the inferences therefrom must be taken in the light most favorable to the verdict. Amador v. Lea's Auto Sales & Leasing, Inc., 916 S.W.2d 845 (Mo. App. S.D. 1996).

B. The Standards for Personal Jurisdiction:

When reviewing a Motion to Dismiss for lack of personal jurisdiction over a non-resident defendant there are two necessary inquiries. Shirkey, supra at 649. First, the Trial Court must determine whether the suit arose out of activities laid out in the Long-Arm Statute (§506.500, RSMo.) and second, the Trial Court must determine whether the exercise of personal jurisdiction would violate due process. Long-arm statutes, as the name implies, are intended to expand the reach of the law of the state to authorize jurisdiction over foreign corporations that are not necessarily authorized to do business in the state but whose activities justify personal jurisdiction. State ex rel. K-Mart Corp. v. Holliger, 986 S.W.2d 165, 168 (Mo. banc 1999). Missouri's long-arm statute was designed to allow the exercise of jurisdiction over out-of-state defendants to the extent permissible under the due process clause. State ex rel Metal Service Center of Georgia, Inc. v. Gaertner, 677 S.W.2d 325, 327 (Mo. banc 1984). In order for due process standards to be met, the defendant must merely have such contacts with this state that it could reasonably anticipate being haled into court in Missouri. Hagen v. Rapid American Corporation, 791 S.W.2d 452 (Mo. App. E.D. 1990). Defendant IMCO's conduct and contacts meet both of these standards entitling the state of Missouri to

exercise personal jurisdiction.

C. Defendant IMCO waived its right to contest personal jurisdiction by seeking affirmative relief from the Trial Court.

Defendant IMCO waived any argument it may have had that the Trial Court lacked personal jurisdiction by the filing of its cross-claim against Max Sweet. Plaintiff's position on this issue is based on cases such as State ex rel. Sperandio v. Clymer, 581 S.W.2d 377, 384 (Mo. banc 1979) where this Court said:

> "The general principle is that if a party takes any action which recognizes that the cause is in court and assumes an attitude that the jurisdiction of the court has been acquired, he is bound thereby and the action amounts to a general appearance."

While there are a number of Missouri cases which recognize that once a defendant who contests personal jurisdiction files a Motion to Dismiss he is thereafter entitled to take other actions in court in order to defend his position, Defendant IMCO was clearly doing more than merely defending its position when it chose to participate in the cross-claim filed against Co-defendant Max Sweet. As noted by the Court of Appeals for the Eastern District in Germanese v. Champlin, 540 S.W.2d 109, 112 (Mo. App. E.D. 1976):

> ". . . if a party takes any action in a case which recognizes the case as being in court this will amount to a general appearance. Thus, where he seeks relief he necessarily assumes the attitude that the jurisdiction of the court has been acquired and, having taken that position, he is bound thereby and will not be heard afterward to say otherwise." (emphasis ours).

Rule 55.05 of the Missouri Rules of Civil Procedure describes a cross-claim as "a claim for relief". Missouri Courts have specifically held that an assertion of the right to indemnity or contribution[7] in the form of a cross-claim constitutes a request for affirmative relief. State of Missouri ex rel. Taylor v. Luten, 710 S.W.2d 906 (Mo. App. E.D. 1986).

Defendant IMCO crossed the line between defense and affirmative relief when it filed it's cross-claim for contribution against Max Sweet (L.F. 73-74). Such an action might have been excused as necessary to the defense were it compulsory, but there was no need to seek affirmative relief in the pending lawsuit because a cross-claim for contribution is not mandatory but may be sought in a separate suit at a later date. Safeway Stores, Inc. v. City of Raytown, 633 S.W.2d 727, 731-32 (Mo. banc. 1982). Relief raised in a counter-claim or cross-claim that could have been maintained independently of Plaintiff's action constitutes affirmative relief. Velda City v. Williams, 41 S.W.3d 915 (Mo. App. E.D. 2001).

The filing of the cross-claim seeking affirmative relief from the Trial Court constitutes a waiver of any claim of lack of personal jurisdiction. The Trial Court's assertion of personal jurisdiction over Defendant IMCO was proper and must be affirmed.

D. IMCO Recycling, Inc. is subject to personal jurisdiction in Missouri under the Long-Arm Statute because it transacted business within the state:

There are a number of activities set forth in Missouri's long-arm statute which are sufficient to confer personal jurisdiction over Defendant IMCO. These activities are identified in Rule 54.06 of the

[7] This is exactly the relief requested by Defendant IMCO in the instant case (L.F. 73-74).

Missouri Rules of Civil Procedure. Sub-paragraph (1) of Rule 54.06 concerns the transaction of business within the state. Missouri Courts have noted that "transaction of any business" for purposes of establishing long-arm jurisdiction, must be construed broadly and that a corporation may be subject to long-arm jurisdiction even though it would not be required to qualify to do business as foreign corporation. It has also been held that the "business" may consist of a single transaction if that transaction is the one which is sued upon. State ex rel. Metal Service Center of Georgia, Inc. vs. Gaertner, 677 S.W.2d 325 (Mo. banc 1984). In the instant case, despite Defendant IMCO's arguments to the contrary, the trial court heard the testimony of Marnor plant manager, Juan Torres, (who testified by videotaped deposition at trial) that as the manager of the Marnor plant located in Sikeston, Missouri (TR. 144) he was employed by IMCO "out of Texas". He testified that his checks and benefits came from IMCO. (TR. 151-152). There was also testimony that the profits from the Marnor plant (which was managed by him as an IMCO employee) went directly back up the chain of command and wound-up in the pockets of Defendant IMCO, evidencing purposeful activity by Defendant IMCO in the state of Missouri for its direct economic gain. (TR 185-186). Although defendants may claim there is conflicting evidence on some of these issues, resolution of conflicting evidence in considering jurisdictional issues is left to the Trial Court's sound discretion. Chromalloy American Corp. v. Elyria Foundry, Co., 955 S.W.2d 1, 4 (Mo. banc 1997).

Clearly Defendant IMCO had some role in the operation of the Sikeston plant.[8] The presence of

[8] Despite its protestations to the contrary in the instant case, Defendant IMCO represents to the general public that it acquired the plant in Sikeston, Missouri (Marnor) in 1995. This representation and others which support the Trial Court's finding that IMCO Recycling, Inc. is appropriately subject to

the personal jurisdiction of the state of Missouri can be found on the company website, www.imcorecycling.com which contains representations that:

> IMCO Recycling, Inc. is "the world's largest recycler of both aluminum and zinc, now operating 23 U.S. production facilities located in the nation's major regions." (S.L.F. 105, Addendum 30).

Those production facilities are then shown on a map graphic which includes a plant in Sikeston, Missouri. (S.L.F. 108, Addendum 33). The website also includes a section titled "Milestones in IMCO Recycling's History" which represents that in 1995 IMCO Recycling, Inc. acquired several plants, including one located in Sikeston, Missouri. See,(S.L.F. 107 and Addendum 32). The question for purposes of determining whether Defendant IMCO Recycling, Inc. had sufficient minimum contacts with the state of Missouri so that it might reasonably expect to be haled into Missouri courts can only be answered in the affirmative. Defendant IMCO clearly boasts a commercial presence in this state which allowed the Trial Court to assert personal jurisdiction over the company without offending traditional notions of fair play and substantial justice.

Defendant IMCO's employee managing a plant in the state of Missouri is a sufficient contact to impose personal jurisdiction upon Defendant IMCO. This is particularly true in light of the fact that there was testimony that Defendant IMCO's employee, Juan Torres, was the person who handled the installation of the defective furnace which injured Ernest Bland and was the person managing the plant when Mr. Bland was injured. (TR. 144, S.L.F. 068).

Even if Torres had not been physically present in the state of Missouri, Defendant IMCO's website alone provides a sufficient basis for the imposition of personal jurisdiction. Physical presence is not a necessary factor in commercial cases for establishing minimum contacts between the defendant and the forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

This Court recently examined the propriety of basing personal jurisdiction on an Internet website and in so doing retransferred the case to the Eastern District for reinstatement of the original opinion which had found personal jurisdiction was properly based on the defendant's Internet presence in this state. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (Mo. App. E.D., Nov. 20, 2000) *original opinion reinstated after transfer to the Supreme Court on July 27, 2000 and retransfer to the Court of Appeals November 14, 2000.*

In Beer Nuts this court noted that once a company places its website on the Internet there is no

way that it can prevent residents of Missouri who have access to the Internet from visiting the site and reading the information available on the site. Id. at 830. That opinion also pointed out that more than 1.5 million Missouri consumers have access to the Internet Id.

Defendant IMCO's website boasts a physical presence in Missouri (S.L.F. 107, 108); it advertises Defendant IMCO's products and services (S.L.F. 107), solicits investors (S.L.F. 109), provides a method of sending and receiving e-mail between Missouri residents and Defendant IMCO (S.L.F. 109) and provides additional methods of contacting Defendant IMCO (address, telephone and facsimile) for further information (S.L.F. 109). (See, also, Addendum to Plaintiff's brief pages 30-35). All of these factors were considered by the court in Beer Nuts to be part and parcel of conducting the company's business. Defendant IMCO clearly conducted business in this state sufficient to allow Missouri to assert its long-arm jurisdiction.

E. IMCO Recycling, Inc. is subject to personal jurisdiction in Missouri under the Long-Arm Statute because it committed a tortious act in the state:

Another basis for long-arm jurisdiction is the commission of a tortious act within the state. Defendants' argument on this point entirely ignores the fact that the evidence, taken in the light most favorable to the Plaintiff, establishes that the plant was managed by one of Defendant IMCO's[9] employees

[9] Defendant IMCO argues that the references to IMCO or IMCO, Recycling by witnesses may have been references to other related companies, ie., IMCO Management Partnership and/or IMCO Recycling of Illinois, Inc. If there was confusion over the names, Defendant IMCO cannot now be heard to complain that the court and the jury resolved the confusion by believing that references to

IMCO were indeed references to IMCO Recycling, Inc. the Delaware corporation with its principal place of business in Dallas, Texas. As previously noted, the Defendants bore the burden of proof on this issue because the information was peculiarly within their knowledge and not equally available to Plaintiff. It is enlightening that even Paul DuFour, IMCO's chief financial officer for twelve (12) years didn't know for sure at the time of his deposition whether he worked for IMCO Recycling, Inc. or IMCO Management Partnership. (TR. 180). At no time did counsel for the Defendants ever attempt to clarify which IMCO entity was being discussed. While this may have been strategy employed by counsel in the hope of creating a certain claim of error, once the jury renders a verdict, all inferences from the evidence must be taken in the light most favorable to the jury's verdict. Therefore, conflicting evidence does not support dismissal or reversal. Conflicting evidence requires that the judgment be affirmed.

and that the same employee supervised the assembly of the defective furnace. Plaintiff presented testimony that Defendant IMCO directed and orchestrated the transfer of the defective furnace from Pittsburgh, Kansas to the Marnor facility in Sikeston. Defendants claim the decision was made by Jonathan Markle, who was an employee of Metal Mark at the time, however, Markle himself testified via his videotaped deposition at trial that he had been president of Metal Mark, Inc. until the sale of Metal Mark, Inc. to IMCO Recycling, Inc. in October of 1995. (TR. 270).

After October of 1995, and specifically at the time the decision was made to transfer the furnace in November of 1995, Markle testified that he was the president of the Metal Mark division of IMCO Recycling, Inc. (TR. 270) and, although he was the person who actually ordered the transfer, he specifically testified that he gave that order only after getting authority from Defendant IMCO (TR. 275-276). Markle clearly acted on behalf of and at the direction of Defendant IMCO with respect to the transfer of this furnace. Further, the transfer was not complete until the furnace was assembled and installed by Defendant IMCO's employee Juan Torres. (TR. 107-108). Defendant IMCO clearly has sufficient minimum contacts with the state of Missouri to satisfy traditional notions of fair play and substantial justice. Defendants' claim that the Trial Court was without personal jurisdiction is not supported by the record.

(1) Plaintiff's claims against Defendant IMCO are not based upon its status as Metal Mark, Inc.'s ultimate corporate parent but on the independent acts of IMCO as a separate corporation.

In this section of its brief Defendant IMCO presents legal arguments and case law on an issue which is not before this Honorable Court. Plaintiff has no need to "pierce the corporate veil" in this case because Plaintiff has never argued that corporate forms should be disregarded. To the contrary, Defendant

IMCO committed negligent acts independently of Metal Mark. As is shown by Plaintiff's arguments in Section I of this brief, Plaintiff's position with respect to Defendant IMCO is that Defendant IMCO supplied its own employee, Juan Torres to manage the plant. Defendant IMCO controlled the dismantling of the Pittsburgh facility and coordinated transfer of the defective furnace to the state of Missouri in concert with Jonathan Markle. Defendant IMCO had an employee who was physically present in the state of Missouri and who was the very person who supervised the installation of the dangerous instrumentality which injured Ernest Bland. No amount of legal maneuvering can change these facts which require that Defendant IMCO be held accountable for the harm it has done to Ernest Bland.

(2) IMCO Recycling, Inc. has sufficient minimum contacts with the state of Missouri to submit it to personal jurisdiction here.

Plaintiff has already extensively briefed the substantial contacts between Defendant IMCO and the state of Missouri. Those facts are hereby realleged in their entirety.

IMCO's presence in this state went beyond a single phone call or letter was the alleged basis for jurisdiction in TSE Supply Company v. Cumberland Natural Gas Company, 648 S.W.2d 169 (Mo. App. E.D. 1983). It went beyond a singular response to an unsolicited consultation as was the case in Sperandio, *supra*. It went beyond mailing a letter into the state as was the act relied on to confer jurisdiction in Stavrides v. Zerjar, 848 S.W.2d 523 (Mo. App. E.D. 1993). Defendant IMCO's employee, Juan Torres had a physical presence in the state of Missouri. He directly participated in the negligent act which caused injury to the Plaintiff. Personal jurisdiction is entirely appropriate in this case.

ARGUMENT III

III. The Trial Court did not err in denying Metal Mark, Inc.'s Motion to Dismiss for lack of subject matter jurisdiction because (1) the Trial Court had jurisdiction to make a finding as to whether Ernest Bland was an employee of Metal Mark on the date of the accident; (2) the Trial Court specifically found that Ernest Bland was not an employee of Metal Mark but was, instead, employed on that date by Marnor Aluminum Processing, Inc.; and (3) the Trial Court did not abuse its discretion in making these findings because there was compelling evidence that Marnor and not Metal Mark was the Plaintiff's employer at the time of the injury in that Metal Mark's claim was based solely on the premise that Metal Mark, had become Bland's employer at the time of the merger by operation of law. This premise was negated by the responsive pleadings filed on behalf of the defendants which constitute an admission of Marnor's continued corporate existence.

A. Introduction:

The Trial Court's judgment in Plaintiff's favor and against Metal Mark should be affirmed because the Trial Court did not abuse its discretion in finding that it had subject matter jurisdiction over Metal Mark. The exclusivity provisions of Section 287.120.2 RSMo., did not apply to Metal Mark because the Trial Court appropriately found that Marnor Aluminum Processing, Inc. and not Metal Mark was Ernest Bland's employer on the date of the accident.

B. Standard of Review:

Defendants state the appropriate standard of review in their brief when they state that on appeal,

this court's review of the Trial Court's assumption of subject matter jurisdiction is governed by an abuse of discretion standard. James v. Union Electric Company, 978 S.W.2d 372, 374 (Mo. App. E.D. 1998). The Defendants are also correct in stating that the burden of showing that the Trial Court lacked subject matter jurisdiction is on Metal Mark, the party claiming lack of subject matter jurisdiction. Shaver v. First Union Realty Management, Inc., 713 S.W.2d 297, 299 (Mo. App. S.D. 1986). Defendants have not met this burden.

Under Missouri law, when the question as to whether workers' compensation law applies is close, the decision should be weighted in favor of retention of common law rights because the Workers' Compensation Act is in derogation of common law rights and remedies. Porter v. Erickson Transport Corp., 851 S.W.2d 725, 735-36 (Mo. App. S.D. 1993). In the instant case, the question as to whether workers' compensation law applies was not close in light of the indisputable evidence that Marnor Aluminum Processing, Inc. continued to exist even after the alleged merger with Metal Mark and that Marnor and not Metal Mark entered an appearance and defended the workers' compensation claim as Ernest Bland's employer.

Further, Defendants' contention that any doubts over jurisdiction should be resolved in favor of the Labor and Industrial Relations Commission ignores the fact that the purpose of the Workers' Compensation Act is to protect employees and not employers. As was noted by this Honorable Court in Soars v. Soars-Lovelace, Inc., 142 S.W.2d 866 (Mo. 1940), ". . . the Compensation Act is a 'workmen's compensation act' and not an 'employer's compensation act'." (emphasis ours). The legislative intent of the Workers' Compensation Act, to provide relief to a broad base of injured employees, is not thwarted in any way by the Trial Court's assumption of jurisdiction in the instant case in light of the fact that Marnor had already

become bound to perform the obligations required of an employer by its assumption of those duties in the Division of Workers' Compensation.

C. Section 287.120, RSMo. applies only to employers and thus is not applicable as respects Metal Mark in this case:

Plaintiff has no quarrel with the fact that an employer is entitled to the exclusivity provisions found in Section 287.120, RSMo. Plaintiff's argument is, and the ruling of the Trial Court was, that Metal Mark was not the Plaintiff's employer at the time of the accident. Metal Mark is, therefore, not entitled to the protection of the Workers' Compensation Act and the exercise of jurisdiction by the Trial Court over Metal Mark was proper.

The crucial finding with regard to the issue of whether the Trial Court appropriately assumed subject matter jurisdiction over Metal Mark was whether Ernest Bland was an employee of Metal Mark at the time of his injury. The Trial Court made a specific finding that Marnor Aluminum Processing, Inc. and not Metal Mark, Inc. employed Ernest Bland on the date of his injury. (TR. 14).

D. Metal Mark is estopped from denying the corporate existence of Marnor Aluminum Processing, Inc. because Metal Mark admitted the corporate existence of Marnor in its responsive pleadings:

Defendants take the position that the Trial Court lacked subject matter jurisdiction over Metal Mark because Marnor no longer existed as a matter of law after an alleged merger with Metal Mark in June of 1996. (Appellants' Brief page 24). Because Marnor was no longer in existence, Defendants claim that Metal Mark was entitled to assert its status as Ernest Bland's employer in place of Marnor as a matter of law and thus is entitled to the benefits of the exclusivity provisions of the Workers' Compensation Act.

Defendants' entire argument as to Metal Mark's right to claim the status of Ernest Bland's employer is premised on the false assumption that the corporation known as Marnor Aluminum Processing, Inc. had no corporate existence as the result of the alleged merger of that entity with Metal Mark. This argument must fail because Metal Mark is estopped by Rule 55.13 of the Missouri Rules of Civil Procedure from denying the corporate existence of Marnor Aluminum Processing, Inc. because corporate existence was admitted as a matter of law when Defendants failed to make a specific negative averment on this issue in their responsive pleadings. Rule 55.13 states in pertinent part as follows:

> "It shall be sufficient to aver the ultimate fact of the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of a corporation or of an organized association of persons that is made a party. When a person desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the person shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." (emphasis ours)

Plaintiff alleged in his Petition that the Defendant Marnor Aluminum Processing, Inc. was at all times relevant to the lawsuit a corporation in good standing under the laws of the state of Missouri. (L.F. 11). Defendant filed a responsive pleading in the form of a Motion to Dismiss (L.F. 31-32). That motion does not deny the corporate existence of Marnor Aluminum Processing, Inc. Instead, Marnor, along with the other defendants including Metal Mark, implored the Court to dismiss the Plaintiff's case because it claimed to be entitled to the exclusivity provisions of Section 287.120, RSMo. on the basis that Marnor was Ernest

Bland's employer. (L.F. 31).

In the Plaintiff's First Amended Petition the corporate status of Defendant Marnor Aluminum Processing, Inc. is pleaded again in paragraph 3 (L.F. 33). This time the Defendants collectively filed an answer which included a general denial of paragraph 3 of Plaintiff's First Amended Petition. (L.F. 64). Under Missouri law this answer constitutes an admission of the continued corporate existence of Marnor Aluminum Processing, Inc. which cannot now be disclaimed by the Defendants. A denial in general terms is insufficient to constitute a "specific negative averment" as required by Rule 55.13. Student Loan Marketing Association v. Holloway, 25 S.W.3d 699, 704 (Mo. App. W.D. 2000). Such a denial is treated as an admission of corporate status. Id. at 705.

When a defendant admits that a corporation was doing business at the time of the incident which is being sued upon, the Defendant is thereafter estopped from ascertaining that the corporation could not sue or be sued because of statutory corporation regulations. Schneider v. Best Truck Lines, Inc., 472 S.W.2d 655, 657-58 (Mo. App. 1971).

In Schneider the Court found that Best Truck Lines, Inc. could be sued despite the fact that it had clearly forfeited its charter and, as a result, under the statutory provisions of the Business Corporation Act it could not be a party plaintiff or a defendant because it was no longer a legal entity. Id. at 657. In reaching this decision the Court said:

> "The record plainly does show that both its Kansas charter and corporate good standing in Missouri were not restored to Defendant until December, 1969, almost six (6) months after its answer was filed. Yet, it taxes our credulity that Defendant should not have been

aware of the state of its corporate life at the time it pleaded. Under the circumstances, we do not believe Defendant may have the advantage of its own mistake to make a issue of corporate status . . .

....Over and above this, although on the day of forfeiture of its charter the corporation ceased to exist and could not function thereafter (until recission of the forfeiture) as a corporate entity, only those not estopped might assert that fact." Id. at 658-59. (emphasis ours)

The same rationale applies in the instant case. Metal Mark claims that it was the surviving corporation after a merger with Marnor in June of 1996. If such was the case, Metal Mark may reasonably be charged with knowledge of Marnor's corporate status both at the time the answer to the claim for compensation was filed and at the time the petition in the instant case was answered. In neither court did Metal Mark plead that it was Earnest Bland's employer by virtue of its merger with Marnor. To the contrary Marnor, as a separate entity, filed pleadings both in the Division of Workers' Compensation and in the Trial Court in its own name. Metal Mark failed to deny by specific negative averment Marnor's corporate status[10] and is bound by its judicial admission of Manor's continuing corporate existence. In light

[10] Not only did Metal Mark fail to specifically aver that Marnor no longer had a corporate existence, Marnor itself answered the Plaintiff's First Amended Petition and also failed to aver that it no

of that admission, the Trial Court's finding that Marnor not Metal Mark was Ernest Bland's employer at the time of his injury could not possibly be viewed as an abuse of discretion.

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longer existed by virtue of the alleged merger. (L.F. 64).

Of further note is the Schneider Court's statement that the trial judge was justified in rejecting evidence in the form of exhibits from the Secretary of State's Office regarding the corporate forfeiture. In like manner, Judge Dolan was justified in rejecting the evidence[11] tendered by Defendants with respect to the alleged merger between Metal Mark and Marnor.

E. The evidence from the Division of Workers' Compensation showed that Marnor and not Metal Mark had entered an appearance and defended the claim in the capacity of Ernest Bland's employer:

Because of the admission by the defendants of Marnor's continued corporate existence, it was reasonable for the trial judge to look to the records of the Division of Workers' Compensation for evidence of the identity of Ernest Bland's employer.

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[11] While the Trial Court did allow these exhibits to be introduced for purposes of the record, as the fact finder on the issue of who employed Ernest Bland, the trial judge was free to disregard the exhibits in reaching his decision as to which entity employed Ernest Bland at the time of his injury. This was not an abuse of discretion in light of Metal Mark's admission of Marnor's continued corporate existence.

At the time the instant case went to trial on February 22, 2000, there was pending in the Missouri Division of Labor and Industrial Relations a workers' compensation claim arising out of the same injury. That claim was filed on June 9, 1997 (S.L.F. 076-077). On June 16, 1997, one year and thirteen days after the claimed merger between Marnor and Metal Mark, Marnor Aluminum Processing, Inc. filed an answer in which Marnor asserted its status as Ernest Bland's employer (S.L.F. 078). Failure to report the name of the employer correctly in an answer filed with the Division of Workers' Compensation is a binding judicial admission. Schepp v. Mid City Trucking Company, 291 S.W.2d 633, 643 (Mo. App. E.D. 1956).[12]

[12] Even assuming that the "eleventh hour" attempt to amend was valid (which is denied) the trial judge was entitled to treat the abandoned pleading as an admission against interest. Hall v. Denver-Chicago International, Inc., 481 S.W.2d 622, 628 (Mo. App. W.D. 1972). Such admissions are regarded as highly persuasive. Grgic v. P&G Construction, 904 S.W.2d 464, 467 (Mo. App. E.D. 1995).

The aforementioned compensation claim had been pending for two years, eight months and fourteen days on the date that the civil trial against Metal Mark commenced. During that time period TTD and medical benefits were paid to Ernest Bland (TR. 298) by and on behalf of his employer, to wit, Marnor Aluminum Processing, Inc. The certified records of the Division of Workers' Compensation which were filed with the Trial Court by the Plaintiff at the beginning of the trial show that Metal Mark was never mentioned in any pleading or correspondence reflected in the official files of the Division of Workers' Compensation. (S.L.F. 075-095). It was not until the civil trial had commenced that Metal Mark made any attempt to claim status as Ernest Bland's employer in the Division of Workers' Compensation.[13] On February 23, 2000 (the second day of trial), Metal Mark filed an amended answer in the Division of Workers' Compensation claiming for the first time that it, and not Marnor was Ernest Bland's employer on the date of his injury in January of 1997. (Defendants' Exhibit DD).

When Metal Mark sought to use this amended answer as evidence of its status as an employer in the Trial Court through its introduction as part of Exhibit "DD", counsel for Plaintiff objected. (TR. 349). The exhibit was admitted over Plaintiff's objection (TR. 350), but the Trial Court chose not to give credence to this amendment in light of the pleadings previously filed (TR. 350). The court noted that Plaintiff's case against Marnor had already been dismissed based on its apparent entitlement to the

[13] It is a reasonable inference that but for the civil litigation which forced Metal Mark's hand, Metal Mark would never have entered an appearance in the Division of Workers' Compensation until after the Statute of Limitations had run on Plaintiff's workers' compensation claim, potentially depriving Plaintiff of any recovery.

exclusivity provisions of the Workers' Compensation Act. (TR. 14, 17). This decision to dismiss Marnor was based in part on Plaintiff's reasonable belief that the corporate existence of Marnor was not an issue because its existence had never been denied by any of the defendants and Marnor, in its corporate capacity, had not only defended the workers' compensation claim, but also had filed pleadings in the civil suit.

The attempted amendment of the employer's answer in the Division of Workers' Compensation came too late to help Metal Mark as the Circuit Judge had authority to make a determination as to whether Ernest Bland was an employee of Metal Mark and had already made the finding that Metal Mark was not the employer based on controverted evidence (including the Defendants' admission of corporate existence) which he had the authority to resolve. (TR. 14). Jones v. Jay Truck Driver Training Center, Inc., 709 S.W.2d 114, 115-116 (Mo. banc. 1986) *affirming* Lamar v. Ford Motor Company, 409, S.W.2d 100 (Mo. 1966). The only basis for Metal Mark's argument that it was Ernest Bland's employer was its contention that it attained that status as a matter of law after the alleged merger which extinguished Marnor's corporate existence. However, as previously noted, Metal Mark is estopped from denying Marnor's corporate existence and its argument that it was Ernest Bland's employer must fail for lack of proof.

F. The Trial Court did not abuse its discretion because its decision was reasonably based on the pleadings filed both in the civil suit and with the Division of Workers' Compensation:

The trial judge was within his authority and had jurisdiction to make a factual determination as to who employed Ernest Bland on the date of his accident. As previously noted herein[14] whether Judge Dolan

[14] See, James v. Union Electric, supra.

erred in making this finding must be analyzed under the abuse of discretion standard.

In determining whether the Trial Court's ruling amounted to an "abuse of discretion", the evidence must be viewed in the light most favorable to the result of the Trial Court. Discretionary rulings shall be presumed to be correct and the Appellant bears the burden of showing that the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Wade v. Wade, 982 S.W.2d 330 (Mo. App. S.D. 1999) (emphasis ours).

It simply cannot be said that Judge Dolan abused his discretion in finding that Marnor (and not Metal Mark) was Ernest Bland's employer on the date of his accident. The most powerful evidence supporting this finding is the combined admission by Defendants of Marnor's continued corporate existence and the records of the Division of Workers' Compensation tendered to the Court by the Plaintiff. (S.L.F. 075-095). Although Metal Mark contends that Marnor could not be Ernest Bland's employer because it no longer had corporate existence, this contention is negated by Metal Mark's failure to specifically aver lack of Marnor's corporate status in its responsive pleadings.

G. The Trial Court did not abuse its discretion on the issue of merger:

Defendant Metal Mark claims that Marnor was not in existence on the date of the accident because Marnor had allegedly merged with Metal Mark on June 3, 1996. If that were so, how can Metal Mark (the alleged surviving corporation) explain the filing of an answer before an administrative tribunal by Marnor more than a year after the alleged merger between the two companies? Or, more to the point, how can it explain the filing of a Motion to Dismiss, an Answer and a Cross Claim by Marnor in the instant case? Metal Mark's current assertion that it is Ernest Bland's employer is simply inconsistent with both its judicial

admissions and the established fact in this case that Marnor was the entity which answered and defended the claim in the Division of Workers' Compensation. Metal Mark's attempt to hide behind the cloak of the alleged merger is not sufficient to overcome the plain evidence of the certified workers' compensation file, particularly because the Trial Court was free to reject the documentary evidence[15] of the alleged merger based on the admission of corporate existence which resulted from Metal Mark's failure to make a specific negative averment of the non-existence of Marnor's corporate status. If reasonable men can differ about the propriety of an action taken by the Trial Court then it did not abuse its discretion Wade, supra at 335.

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[15] While records from the Office of the Secretary of State are evidence of corporate status, they constitute only one piece of evidence which can be rebutted by other competent evidence such as that adduced by the Plaintiff in this case in the form of certified records from the Division of Workers' Compensation which were filed after the alleged merger and contained information contrary to that filed with the Secretary of State. *See*, H.D.H. Development and Reality Corporation, Inc. v. Smith, 717 S.W.2d 274 (Mo. App. 1986).

H. Even if there had been no admission of Marnor's continued corporate existence entitling the Trial Court to reject the evidence of merger, the Articles of Merger are inconclusive:

Plaintiff concedes that on June 3, 1996, Metal Mark filed Articles of Merger in the state of Illinois (S.L.F. 045) and further concedes that under Missouri law, when a domestic corporation merges with a foreign corporation and the foreign corporation is the "survivor" of the merger, the merger is effective in Missouri on the date that it became effective in the state where the foreign corporation is incorporated. Section 351.458, RSMo. However, this does not end the inquiry as to the effective date of the merger in the instant case as suggested by the Defendants. Unlike the law in Missouri, the effective date of a merger in Illinois is not necessarily the date on which the certificate of merger is filed. 805 ILCS 5/11.40 provides that the merger may become effective at a later date "as provided for in the plan."

The plan in the instant case states as follows:

> "RESOLVED that, effective as of June 1, 1996 for accounting purposes only, subsidiaries merge (the 'merger') with and into PARENT and parent shall be the surviving corporation (the 'surviving corporation') pursuant to the Illinois Business Corporation Act of 1983; . . ." (emphasis ours). (S.L.F. 047, Addendum 26).

No explanation was offered or received with respect to limitation of the merger "for accounting purposes only". As a result, the words must be given their plain meaning. The phrase "for accounting purposes only "[16] means just that–the merger is limited to accounting practices and not to operations of the

[16] "Only" is defined as "solely; merely; for no other purpose; at no other time; in no otherwise;

corporation. Plaintiff anticipates that the defendants will argue that the document in question also describes Metal Mark as the "surviving corporation" which would infer that Marnor no longer existed, but plaintiff contends that the inconsistent language creates an ambiguity to be resolved by the fact finder–in this case, the Trial Judge.

Based on this ambiguity it cannot be said that the Trial Judge abused his discretion in failing to find the merger documents as controlling on the issue of Marnor's existence, particularly in light of the more compelling workers' compensation documents which indicated the separate existence of Marnor more than a year after the alleged merger and Marnor's own pleadings filed in the civil suit over which he presided.

Defendants' reliance on Quick v. All Tel Missouri, Inc., 694 S.W.2d 757 (Mo. App. E.D. 1985) is misplaced. In that case there was no question that a valid merger had occurred prior to the Plaintiff's injury. There was no issue about the corporate existence of the subsumed corporation. Nor had the subsumed corporation filed pleadings asserting the status of employer. These facts distinguish the Quick case from the instant case. Here, the Trial Court was faced with a situation where, despite the alleged merger, the corporation which was supposed to have been subsumed filed pleadings in the civil case and entered an appearance in the workers' compensation case and defended it for nearly three years. The Illinois merger documents were ambiguous and no testimony was offered for purposes of clarification.

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alone; of or by itself; without anything more; exclusively; nothing else or more; Black's Law Dictionary, 5th Edition, page 982.

Absent evidence of a clear merger, the Quick case has no applicability to the instant action.

G. Conclusion:

Defendant Metal Mark cannot now be heard to complain that the Trial Judge abused his discretion in ruling on this issue. It was Metal Mark's own failure to seek timely resolution of the issue of subject matter jurisdiction which placed the Trial Judge in the unfortunate position of having to make a ruling on this jurisdictional issue while he had a jury waiting in the wings to hear the merits of the case. Had Metal Mark been serious about this defense it should have called up its Motion to Dismiss for a separate hearing and, if the motion had been denied, it could have filed for a Writ of Prohibition to keep the court from inappropriately exercising jurisdiction. Instead, Metal Mark chose to lie in the weeds, waiting until the morning of trial to raise the issue of merger and even then it failed to have appropriate personnel on hand to address the ambiguity of the merger plan. As previously noted, the Trial Judge's rulings must be evaluated based on the evidence and circumstances which existed at the time his discretion was exercised, *see*, Wade, *supra*. Under these circumstances it cannot be said that Judge Dolan abused his discretion.

Calculated strategies of the type employed by Metal Mark in this case have been condemned by Missouri courts in the past. In Porter v. Erickson, *supra* at 736, the Southern District Court of Appeals held that a party would not be permitted to take a position with regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him. Applying that principle to the existing case it would be inequitable to allow Metal Mark to have failed to contest the corporate existence of Marnor in the civil case and to have ignored its responsibilities under the Workers' Compensation Act for more than three

years only to suddenly claim employer status when the threat of civil liability loomed imminent. Like the defendant in Porter which belatedly attempted to assert status as an "employer" as a defense to a civil suit after having previously allowed another company to defend the pending workers' compensation claim, Metal Mark should be required to face the consequences of its previous failure to deny Marnor's corporate existence and to assert its own status as Ernest Bland's employer.

Plaintiff urges this Honorable Court to reaffirm the policy enunciated in Porter, *supra*, that companies will not be allowed to take inconsistent positions in an effort to avoid liability to an injured employee. This Court can affirm that policy by finding that the Trial Court, under the totality of circumstances present in this case, did not abuse its discretion and appropriately exercised subject matter jurisdiction over Metal Mark, Inc. The Trial Court's finding on this issue should be affirmed.

CONCLUSION

There is no legitimate basis for this Honorable Court to set aside the jury's verdict. Viewed in the light most favorable to the Plaintiff, as it must be, there was substantial evidence that IMCO Recycling, Inc. supplied the furnace and that it knew, or in the exercise of ordinary care could have known, that the furnace was being operated without doors, guards or shields. The Trial Court did not err in finding that the exercise of personal jurisdiction over IMCO Recycling, Inc. was proper either on the basis that personal jurisdiction was waived by Defendant IMCO's request for affirmative relief in its cross-claim or on the basis of long-arm jurisdiction with a finding that there were sufficient minimum contacts between IMCO Recycling, Inc. and the state of Missouri. Finally, the Trial Judge did not abuse his discretion in finding that the court had subject matter jurisdiction over Metal Mark, Inc. because Metal Mark is estopped from claiming that the alleged merger subsumed Marnor as a corporate entity so that, as a matter of law, Metal Mark became entitled to assert it status as Ernest Bland's employer and thereby to invoke the exclusivity provisions of the Workers' Compensation Act.

All of these rulings made by the Trial Judge were appropriate and within his broad discretion. The judgment of the Trial Court should be affirmed in all respects.

Respectfully submitted,

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The undersigned certifies that two (2) copies of the brief of Respondent Ernest Bland were served upon:

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Amy L. Klingemann
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by depositing the same in the United States mail, with sufficient first class postage affixed, this _____ day of December, 2001.

By:_____

Subscribed and sworn to before me, a Notary Public, this _____ day of December, 2001.

_____
Notary Public

My commission expires:

ADDENDUM

Certified copy of Ernest Bland's Workers' Compensation file	A1-A21
Metal Mark's merger plan as filed with Illinois Secretary of State	A22-A29
Downloads from IMCO Recycling, Inc. website submitted to the Trial Court April 26, 2000	A30-A35